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In the

Supreme Court of the United States

October Term, 1956

JOHN FEDERIKA, ET AL.,
Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION FOR REHEARING

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PETITION FOR REHEARING

A petition for rehearing of the order denying the petition for Writ of Certiorari is hereby filed.

STATEMENT

The three taxpayers and their wives, who filed petition herein, have been unjustly treated by the Commissioner of Internal Revenue in that he set up deficiency assessments against them not based on fact, estimate, approximation, or any reasonable basis. To state the question conversely the assessment was founded upon arbitrary determination that, (1) the taxpayers should have earned 14% on the gross business handled, (2) the taxpayers should have had net gains from operation on every day they operated, (3) the same business records of taxpayers were accepted for some of the years, some of the weeks and

some of the days, but rejected for some of the years, some of the weeks or some of the days with no reasonable basis for such rejection. The Tax Court of the United States disapproved the action of the Commissioner for some of the years, some of the weeks and some of the days, and without reason approved the action of the Commissioner for some of the years, some of the weeks and some of the days. The exact same evidence and records were supplied for all of the years, weeks or days that petitioners carried on their business.

The Tax Court in the instant case relied on its previous ruling in *Jack Showell,* 23 T. C. 495.

The instant decisions were appealed to the Sixth Circuit and the *Showell* decision was appealed to the Ninth Circuit. The Ninth Circuit reversed (*238 F. 2nd 148*) and the Commissioner decided not to appeal said decision, but returned to the Tax Court for a retrial. In the present case the Court of Appeals Sixth Circuit affirmed on the decision and opinion of the Tax Court. Here the Commissioner opposed a petition for Writ of Certiorari contending that there is no conflict between said cases. All this Court need do is look at the opinion of the Tax Court in *Showell* reported as above cited and the opinion in the instant case contained in the appendix to the Court of Appeals record. It is obvious that the exact questions were considered in both cases, the exact action was taken by the Commissioner and the exact rulings were made by the Tax Court. One Court of Appeals reversed, the other affirmed. There is no distinction in fact. There is no distinguishment in law. Under such circumstances how can it be contended that conflict does not exist?

ARGUMENT

"A Government of man and not of laws"

The Commissioner's contention is founded on "burden of proof" and "finding of fact". With such contention we would have no argument. If the Commissioner made an assessment based on fact, estimate or approximation, the burden of proof would then shift to the taxpayer. If the Tax Court made a finding based on fact, the Appellate Courts should be reluctant to reverse. Here the Commissioner's assessment and the Tax Court findings were not based on fact, but merely on "guess". Under such circumstances, this Court should certainly review. If the petition herein is allowed and the Court examines the record, you will find that no claim or pretense was ever made by the Commissioner, that facts existed substantiating the assessment. You will further find as the Ninth Circuit Court of Appeals did in the *Showell* case that the Tax Court made no finding of fact. Without a finding of fact its opinion is not sustainable.

When the Tax Court renders decisions not sustained by fact and the Courts of Appeal differ, we then have a government of man and not of law. The fundamental principle applicable should be "a government of laws and not of man". This was very well applied to tax cases in *United States* v. *Maryland Yockey Club* (210 F. 2nd 967) "Federal Income Taxes are based on reality, not form, on fact, not fancy, on substance, not seeming".

This Court laid down the rule in *Helvering* v. *Taylor,* 293 U. S. 507, "the fact that the Commissioner's determination of a deficiency was arbitrarily made may reasonably be deemed sufficient to require the board to set it aside". This rule laid down by this Court has been completely ignored by the Tax Court in cases involving persons en-

gaged in the gambling business. See *H. G. Rainwater*, 23 T. C. 450; *Nemmo*, 24 T. C. 67; *Clark* v. *Commissioner*, T. C. Memo 1955-52, wherein the taxpayers' contentions were sustained as against *Showell supra*, and the instant cases where the Commissioner's contentions were sustained with the Seventh Circuit Court of Appeals in *Doyle*, T. C. Memo 1954-234 and *Showell supra Ninth Circuit* reversing the Tax Court and in the instant case the Sixth Circuit Court of Appeals affirming.

It is of greater interest to note that when *McGrath*, 27 T. C. 13, came before the Tax Court and involved exactly the same principles on which it had been reversed in *Commissioner* v. *Doyle*, 231 F. 2nd 635, the Tax Court refused to follow the Court of Appeals.

We are now faced with the situation where the Tax Court holds steadfast to the application of the rule that these cases are to be decided and distinguished on fact. Unfortunately, the assessments proposed by the Commissioner are not based on fact. There being no fact to sustain it, there are no facts on which the Tax Court can base its decisions. When the Court of Appeals in the particular circuit reverses, the Tax Court refuses to follow. When the Court of Appeals in another circuit affirms, this Court refuses to admit the case for review. Taxpayers are left in a muddle and are subjected to the individual opinions of judges rather than aware of an existing uniform rule of law.

The position of the Tax Court in refusing to follow the rulings of the Courts of Appeal is well set forth in *Arthur L. Lawrence*, 27 T. C. No. 83.

> "One of the difficult problems which confronted the Tax Court soon after it was created in 1926 as the Board of Tax Appeals was what to do when an issue came before it again after a Court of Appeals

had rersed its prior decision on that point. Clearly, it mushoroughly reconsider the problem in the light of theasoning of the reversing appellate court and, if corced thereby, the obvious procedure is to followhe higher court. But if still of the opinion that ioriginal result was right, a court of national jurisdion to avoid confusion should follow its own honesbeliefs *until the Supreme Court decides the point*.The Tax Court early concluded that it should decidell cases as it thought right.

"Thiwas not too difficult if appeal in the later case wouldot lie to the reversing Circuit. *Missouri Pacific Rilroad Co.*, 22 B. T. A. 267, 287, which followed *Weste Maryland Railway Co.*, 12 B. T. A. 889, after that ce had been reversed, 33 Fed. (2d) 695 (C. A.-4). he difficulty increased when the Tax Court adherl to its own opinion when appeal would lie to the rersing Circuit. *Southern Railway Company*, 27 B.T. A. 673, 688, affd. on the bond discount issue, 74 F(. (2d) 887 (C. A. -4); *Estate of Edward P. Hugls*, 7 T. C. 1348, 1350; *Harold Holt*, 23 T. C. 469, 78. The pressure increased in situations where morethan one Court of Appeals differed with the Tax Court, but was relieved if one or more agreed with he Tax Court. *Robert L. Smith*, 6 T. C. 255, 257. Cf. *Putnam* v. *Commissioner*, — U. S. — (12-3-56). The Court of Appeals for the Eighth Circuit in tht case affirmed a Memorandum Opinion of the Tax Court, 13 TCM 458, 224 Fed. (2d) 947. The Supme Court affirmed, after granting certiorari, becauscof alleged conflict with *Pollak* v. *Commissioner* (C. .. -3) 209 Fed. (2d) 57, reversing 20 T. C. 376; *Edwrds* v. *Allen*, (C. A. -5) 216 Fed. (2d) 794; *Cudip* v. *Commissioner* (C. A. -6) 220 Fed. (2d) 565, revering a Tax Court Memorandum Opinion, 12 TCM 1290. See also *Basalt Rock Co., Inc.*, 10 T. C. 600, reversed (C. A. -9) 180 Fed. (2d) 281, cert. denid 339 U. S. 966 and *Salko* (*Sokol*) *Brothers Furnitue Co.* v. *Commissioner*, 185 Fed. (2d) 222 (C.

A. -5), affirming a Tax Court Memorandum Opinion, 8 TCM 239 which had followed 10 T. C. 600, cert. denied 340 U. S. 952. Several Courts of Appeals have affirmed the Tax Court on the point decided in the present case.

"The Tax Court and its individual Judges have always had respect for the 11 Courts of Appeals, have had no desire to ignore or lightly regard any decisions of those Courts and have carefully considered all suggestions of those Courts. The Tax Court not infrequently has been persuaded by the reasoning of opinions of those Courts to change its views on various questions being litigated. *Cf. Estate of William E. Edmonds,* 16 T. C. 110; *Albert L. Rowan,* 22 T. C. 865; *James M. McDonald,* 23 T. C. 1091; *Mills, Incorporated,* 27 T. C. — (1-8-57).

"The Tax Court has always believed that Congress intended it to decide all cases uniformly, regardless of where, in its nationwide jurisdiction, they may arise, and that it could not perform its assigned functions properly were it to decide one case one way and another differently merely because appeals in such cases might go to different Courts of Appeals. Congress, in the case of the Tax Court, 'inverted the triangle' so that from a single national jurisdiction, the Tax Court, appeals would spread out among 11 Courts of Appeals, each for a different circuit or portion of the United States. Congress faced the problem in the beginning as to whether the Tax Court jurisdiction and approach was to be local or nation wide and made it nation wide. Congress expected the Tax Court to set precedents for the uniform application of the tax laws, in so far as it would be able to do that. Hearings before Ways & Means Committee, Revenue Act 1926, pp. 10, 869, 878, 911, 926, 932; H. Rept. No. 1, 69th Cong., 1st Sess., pp. 17-19; Congressional Record, Vol. 67, pp. 1136-7, 3749.

"The Tax Court feels that it is adequately supported in this belief not only by the creating legislation and

legislative history but by other circumstances as well. The Tax Court never knows, when it decides a case, where any subsequent appeal from that decision may go, or whether there will be an appeal. It usually, but not always, knows where the return of a taxpayer was filed and, therefore, the circuit to which an appeal could go, but the law permits the parties in all cases to appeal by mutual agreement to any Court of Appeals. Section 7482 (b) (2), I. R. C. 1954. Furthermore, it frequently happens that a decision of the Tax Court is appealable to two or even more Courts of Appeals. A few examples will illustrate. A corporation, having stockholders scattered over the United States, makes a distribution to all. The Commissioner holds it taxable as a dividend from accumulated earnings. The stockholders join in a trial before the Tax Court which decides the issue as to all petitioning stockholders, contrary to a decision of Court of Appeals A, which reversed a prior Tax Court decision, but perhaps in line with an affirming decision of Court of Appeals B. Cf. *Edwin L. Wiegand*, 14 T. C. 136 reversed (C. A. -7) 189 Fed. (2d) 167, affd. (C. A. -3) (6-26-53, unreported), later reversed (C. A. -3) 194 Fed. (2d) 479. If it had rendered a separate different decision for those stockholders in Circuit A, what amount of accumulated earnings would remain for future distributions? Another situation was presented by the *Richmond Hosiery Mills*. That corporation filed its corporate returns for three years with the collector of internal revenue for the district of Georgia and for one intermediate year with the collector of internal revenue for the district of Tennessee. It received one notice of deficiency and filed a single petition in the Tax Court each covering all four years. The Tax Court decided the case for all four years in a Memorandum Opinion and entered but one decision in the proceeding. The taxpayer took appeals to the Circuit Courts of Appeals for both the Fifth Circuit and the Sixth Circuit, in the former as to three of the years and in the latter as to a single year. The Sixth Circuit, in

*Richmod Ho*osiery Mills v. Commissioner, 237 Fed. (2d), 605, a companion case with *Stacey Mfg. Co.*, followed its own prior decision in *Owensboro Wagon Company* v. *Commissioner,* 209 Fed. (2d) 617, reversing 18 T. C. 1107, while the Fifth Circuit, which had not previously passed on this question, in *Richmond Hosiery Mills* v. *Commissioner,* 233 Fed. (2d) 908, adopted the view of the Sixth Circuit as expressed in the *Owensboro* case. Or suppose partners live in different circuits. Are the decisions of the Tax Court as to them to vary accordingly? See *Choate* v. *Commissioner,* 324 U. S. 1, in which the appeal in the case of *Hogan* was taken to the Fifth Circuit which affirmed the Tax Court (1 TCM 208), *Hogan* v. *Commissioner,* 141 Fed. (2d) 92, and the appeal in the case of *Choate* was to the Tenth Circuit which reversed the Tax Court, *Choate* v. *Commissioner,* 141 Fed. (2d) 641, which was then reversed by the Supreme Court, thus affirming the Tax Court (1 TCM 208). Many more similar examples could be given. There is also the sometimes difficult problem of knowing from prior decisions of the appellate court precisely what its attitude is in relation to the current question before the Tax Court. Cf. *Estate of Catherine Cox Blackburn,* 11 T. C. 623, modified 180 Fed. (2d) 952, particularly where it has more than one decision outstanding and each may seem to have a bearing but they are not too easily reconciled. The *Slaff* case already discussed is another example.

"*The Commissioner of Internal Revenue, who has the duty of administering the taxing statutes of the United States throughout the Nation, is required to apply these statutes uniformly, as he construes them.* The *Tax Court,* being a tribunal with national jurisdiction over litigation involving the interpretation of Federal taxing statutes which may come to it from all parts of the country, *has a similar obligation to apply with uniformity its interpretation of those statutes.* That is the way it has always seen its statutory duty and, with all due respect to the Courts of Appeals, *it can*

not conscientiously change unless Congress or the Supreme Court so directs."

The Court of Appeals (in the *Stacey Manufacturing Company* v. *Commissioner,* 237 F. (2d) 605) took another view of the situation:

> "The situation developed in these cases requires the expression of our considered opinion that the Tax Court of the United States is not lawfully privileged to disregard and refuse to follow, as the settled law of the circuit, an opinion of the court of appeals for that circuit. If the tax court is not bound on questions of law by decisions of the appropriate circuit having jurisdiction, why should any jurisdiction be vested in circuit courts of appeals to review decisions of the tax court? The district courts of the several circuits also have statutory jurisdiction in tax cases and they are bound to follow the rules of decision pronounced by the United States Court of Appeals having appellate jurisdiction over the particular district court. The tax court is no less bound to do so. The mere fact that it is a court having jurisdiction in tax cases throughout the United States does not establish the tax court as superior in any aspect to United States District Courts."

What is the solution to this dilemma? Is it the Commissioner's attitude in this case where he accepts the reversal in the *Showell* case and goes back for a new trial and opposes a petition for certiorari in the instant case and seeks to stand on the rule or ruling of the Court of Appeals? Is this conducive to uniform application of tax laws to all taxpayers in all parts of the country?

What is the duty and obligation of the Supreme Court of the United States? Is it merely to consider that its burden of business is too heavy at this time to let in too many cases and thus let injustice continue until such time when its docket is clear and it can examine the question? Are taxpayers to be sentenced to a life term of slavery in having

their lives' accumulations and future earnings subjected to confiscation under governmental tax laws based on "guess" and not on fact. Is this even-handed justice?

A proper respect for the decisions of the highest Court in our land requires us to make this additional effort and appeal to the Court, not to permit the Commissioner of Internal Revenue to blow hot and cold and to play fast and loose with the taxpayers. The fact that the petitioners occupation is that of *"gambler"* does not justify the denial of justice. No such severe penalty is imposed by the law on persons who gain their livelihood from that business.

May we respectfully direct the Court's attention to the quotation from *Gothe*:

> "In the government of men, a great deal may be done by severity, more by love, but most of all by clear discernment and impartial justice which pays no respect to persons."

We respectfully urge the Court to consider this petition for rehearing and to grant petitioners' request for Writ of Certiorari so that the law may again be established and the Commissioner compelled to treat with even-handed justice all taxpayers whether "gamblers" or otherwise occupied.

Respectfully submitted,

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CERTIFICATE

The undersigned counsel for petitioners hereby certify that this petition for rehearing is presented in good faith and not for delay.

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